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No. 91-1272

In the Supreme Court of the United States

OCTOBER TERM, 1991

ANDREW A. LEVY, ET AL., PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, when there is no genuine issue of material fact, a district court may enter a permanent injunction barring individuals from serving as fiduciaries or service providers to employee benefit plans governed by the Employee Retirement Income Security Act of 1974 (ERISA).

2. Whether a finding of numerous, serious violations of ERISA is a sufficient basis on which to grant such an injunction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 42a-48a) is reported at 947 F.2d 639. The judgment of the district court (Pet. App. 39a-41a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1991. The petition for a writ of certiorari was filed on January 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Andrew Levy and W. Randolph Wheeler seek review of a permanent injunction barring them from serving as fiduciaries or service pro-

viders to employee benefit plans. Levy and Wheeler were officers, directors, and stockholders of Tower Asset Management Corp., an investment manager, and its parent and an affiliate; each owned 25% of the companies. Pet. App. 7a.[1] The Tower companies and their principals engaged in over 100 prohibited transactions between 1983 and 1986 while serving as an investment manager to the International Organization of Masters, Mates and Pilots Individual Retirement Account Plan and Pension Plan. "[T]he uncontradicted evidence was that [petitioners and Tower] 'caus[ed] the investment of approximately $30 million of the Plans' assets in companies in which one or more of the [petitioners or Tower] owned an interest and/or from which one or more of the [petitioners or Tower] received fees or other consideration. The investments caused the Plans to lose more than $20 million.'" *Id.* at 44a-45a, quoting *Lowen* v. *Tower Asset Management, Inc.*, 829 F.2d 1209, 1212 (2d Cir. 1987).

The prohibited transactions fell into two general categories. In one category "[t]he [Tower companies] received fees and commissions totaling $1,087,787 or stock ownership interests, or both, from at least twenty-six companies in which Plan assets were invested." Pet. App. 8a; see *id.* at 9a-15a. In the second category, the Tower companies either acquired equity interests in various corporations, for nominal payments or at discounted rates, in connec-

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[1] The third Tower principal was Samuel Kovnat, who owned 50% of the companies. Although a defendant below, Kovant has not petitioned for a writ of certiorari. Wheeler, although a petitioner in this Court, did not file or join in a brief in the court of appeals. Petitioner Levy filed a brief in the court of appeals on behalf of himself and the corporate Tower defendants.

tion with the investment of Plan assets, or petitioners invested substantial Plan assets in companies in which the Tower companies or their individual principals already had a substantial ownership interest. *Id.* at 16a. While the court of appeals noted in 1987 that the evidence showed that the Plans had lost more than $20 million (see *id.* at 45a), the magistrate has since found that the losses to the Plans as of September 1987 amounted to $34.2 million, plus interest. C.A. App. A10 (docket entry) (No. 91-6174).

2. In a prior case, the trustees to the Plans sued the Tower corporations and their principals (including petitioners), alleging multiple fiduciary breaches and prohibited transactions in violation of Sections 406 and 409 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1106 and 1109. The trustees moved for partial summary judgment to secure restitution for the unlawfully obtained fees and equity interests, and to establish their entitlement to damages for losses incurred by the Plans as a result of the prohibited transactions. See 29 U.S.C. 1109, 1132(a)(2). Following oral argument, and after "consider[ing] the pleadings, depositions, and exhibits," the district court found that there were "no genuine issues as to any material fact" and granted the trustees' motion. Pet. App. 6a. In its memorandum opinion, the court ruled that petitioners were fiduciaries within the meaning of Section 3(21) of ERISA, 29 U.S.C. 1002(21). Pet. App. 17a-26a. With respect to petitioners, it found "a more-than-adequate basis for piercing the corporate veil" to hold them personally responsible as ERISA fiduciaries. *Id.* at 25a. The court then found it "readily apparent" that petitioners had violated Section 406(b)(1) of ERISA, 29 U.S.C. 1106(b)(1)—the prohibition against fiduciary self-dealing—be-

cause "[o]n numerous occasions the[y] dealt with the assets of the Plans in their own interests or for their own accounts." Pet. App. 27a. The court further found that, by accepting fees and equity interests from companies in which they invested Plan assets, the petitioners violated Section 406(b)(3) of ERISA, 29 U.S.C. 1106(b)(3), the "anti-kickback" provision that prohibits the receipt of any consideration for the personal benefit of a fiduciary from "any party dealing with such plan in connection with a transaction involving the assets of the plan." Pet. App. 26a. The court therefore ordered restitution of the $1,087,787 in fees collected by petitioners, as well as restitution of the equity interests petitioners acquired in connection with their unlawful investment of Plan assets. *Id.* at 32a.[2]

The court of appeals affirmed.[3] With regard to the Section 406(b)(1) self-dealing violations, it found that "[petitioners] offer not even a colorable argument that these investments were permissible." 829 F.2d at 1214. With regard to the Section 406(b)(3) kickback violations, it held that in the face of "overwhelming evidence of kickbacks" petitioners had failed to show that there was no connection between the investments they made and the fees received from the various companies. 829 F.2d at 1217. Moreover, the court of appeals determined that "[t]he individual [petitioners] were in no way passive investors in

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[2] The district court did not rule on the losses to the Plans resulting from the prohibited transactions, but directed the magistrate to make that determination. *See Lowen*, 829 F.2d at 1221.

[3] The Secretary of Labor, who had been investigating the same transactions and who had filed this action while the appeal was pending, intervened for purposes of the appeal. 829 F.2d at 1213.

the corporate defendants. They personally and actively controlled and dominated those firms." *Id.* at 1221. It therefore held that "the individual [petitioners] are jointly and severally liable with Tower Asset [and the affiliated companies] because they acted in concert with the latter in causing the prohibited investments." *Id.* at 1220; see *id.* at 1221.

3. In the meantime, class actions were filed on behalf of the Plans' participants and beneficiaries against the Tower defendants and the Plan trustees alleging multiple fiduciary breaches. The Secretary of Labor also brought this action, which was consolidated with the class actions of the private plaintiffs. The Secretary's complaint contained many of the same allegations raised in the trustees' suit and relied on the same facts. Pet. App. 45a. The Secretary, however, sought broader relief, including a permanent injunction barring petitioners from serving as ERISA fiduciaries or service providers. C.A. App. A88-A100 (No. 91-6174). Extensive discovery ensued until November 1, 1990, when the Secretary and the private plaintiffs filed a motion for partial summary judgment. *Id.* at A10-A30 (docket entries). In their depositions, petitioners invoked their Fifth Amendment privilege against self-incrimination and refused to answer any questions directed toward their roles as officers and principal shareholders of the Tower companies. *Id.* at A207-A213; see Pet. App. 45a.

The summary judgment motion asked the court to order restitution and permanent injunctive relief based on the collateral estoppel effect of the determinations in the prior decision. C.A. App. A189-A191 (No. 91-6174). The district court granted the motion on April 18, 1991, explaining that "[t]he issue of liability was considered in the *Lowen* v. *Tower* case.

* * * The findings that have already been made are findings which have the same application in the case brought by the participant plaintiffs and by the DOL as they had in the case brought by the Plan. And the findings that were made in the case brought by the Plan are, for all practical purposes, res adjudicata in the DOL case and the participants case." Pet. App. 34a-35a.[4] The court then permanently enjoined petitioners "from serving directly or indirectly as fiduciaries, investment managers, investment advisors or other service providers to any employee benefit plan covered by Title I of ERISA." *Id.* at 40a. The court also ordered petitioners to make restitution to the Plans of $1,087,878, to be offset by any payments they make in satisfaction of the prior judgment against them. *Id.* at 40a-41a.

4. The court of appeals affirmed in a per curiam decision. Pet. App. 42a-48a. Responding to petitioners' argument that the district court erred by barring them from performing any services for employee benefit plans, the court opined that "[t]he fact that [petitioners] now appear before this court without remorse, with a kitbag of transparent excuses and

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[4] Responding directly to petitioner Levy's arguments that an evidentiary hearing had to be held and a finding of likelihood of recurrence needed to be made before a permanent injunction could issue, the court added: "There is in your papers an undertaking by you to the effect that you have no present intention of offering fiduciary services. That, to me, is just not adequate. * * * I think there is a likelihood of repetition. I think when you say that you have no present intention of serving as a fiduciary, that leaves the necessary implication that at some future time your mind may change. And I don't think that in light of the very serious breaches of fiduciary duty that took place in this case that the public should be left open to that possibility." Pet. App. 37a.

frivolous legal contentions, demonstrates for us the wisdom of [the district court's] ruling." *Id.* at 45a. Finding it "self-evident that such a remedy may be appropriate where individuals participate in the kind of egregious self-dealing proved in *Lowen*," the court rejected the argument that "concrete proof of future wrong-doing is required before a permanent injunction may be granted." *Id.* at 43a. Rather than allow petitioners "to loot a second pension plan before an injunction may be issued," the court of appeals concluded that "serious misconduct that violates statutory obligations" is sufficient. *Ibid.* The court emphasized that "[t]he violations of ERISA set out in *Lowen* were neither technical nor isolated. [Petitioners] had done precisely what the statute expressly forbids and in a massive way." *Id.* at 46a-47a.

The court of appeals likewise rejected the contention that Fed. R. Civ. P. 65 required the district court to hold a hearing before issuing a permanent injunction. The court determined that Rule 65 applies only to preliminary, not permanent, injunctions and that suits for injunctive relief may appropriately be resolved by summary judgment where, as here, there are no material facts in dispute. Pet. App. 47a. Moreover, the court approved the district court's application of collateral estoppel because it concluded that petitioners "had a full and fair opportunity to litigate the issue [of ERISA liability] both at the trial level and on review by this court in *Lowen*." *Id.* at 48a.[5]

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[5] The other three legs of the collateral estoppel doctrine were also met: "(1) the issues in both proceedings [were] identical, (2) the issue in the prior proceedings [was] actually litigated and actually decided, * * * and [(3)] the issue previously litigated [was] necessary to support a valid and final

ARGUMENT

The courts below correctly decided that a permanent injunction was an appropriate remedy for petitioners' many egregious violations of their duties under ERISA and that an injunction could be granted on a motion for summary judgment based on the facts that had been fully litigated in a related case. The decision below does not conflict with any decision of this Court or any other courts of appeals. Further review is therefore not warranted.

1. Petitioners contend (Pet. 7-8) that a permanent injunction of this nature cannot be granted on summary judgment. They are mistaken. Rule 56, by its terms, is applicable to all actions: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see Advisory Committee Notes on Rules 1937 Adoption (Rule 56 "is applicable to *all* actions" (28 U.S.C. App. at 670) (emphasis added)). Accordingly,

> [t]he basic principles generally applicable to summary judgment procedure apply in actions seeking injunctive relief, since there is no reason to differentiate between such actions and any other action. Summary judgment is, therefore, properly rendered in accordance with applicable substantive legal principles where there is no genuine issue of material fact; and is denied

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judgment on the merits." Pet. App. 47a, citing *Gelb* v. *Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986), cert. denied, 480 U.S. 948 (1987).

> when the lack of such a factual issue is not established with certainty.

6 J. Moore & J. Wicker, *Moore's Federal Practice* ¶ 56.17[30], at 56-487 to 56-489 (2d ed. 1988) (citations collecting cases omitted); see also 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2731 (2d ed. 1983) (collecting cases in n.10). In particular, "[t]he procedure has been effectively used at times by governmental agencies and officials to enjoin violation of, or compel compliance with, statutes, with whose enforcement they are charged." *Moore's Federal Practice*, *supra*, ¶ 56.17[30], at 56-490. See, *e.g.*, *SEC* v. *Geyser Minerals Corp.*, 452 F.2d 876 (10th Cir. 1971); *Auto Drive-Away Co.* v. *ICC*, 360 F.2d 446 (5th Cir. 1966); *Bagby* v. *United States*, 199 F.2d 233 (8th Cir. 1952). Thus, contrary to petitioners' supposition (Pet. 8 & n.3), courts routinely have granted permanent injunctions by way of summary judgment.[6]

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[6] As the court below determined (Pet. App. 47a), Rule 65's hearing requirement for *preliminary* injunctions is wholly inapplicable to the issuance of *permanent* injunctions. Moreover, even requests for preliminary injunctive relief undoubtedly may be granted without a hearing if there are no genuine issues of material fact. See, *e.g.*, *FSLIC* v. *Dixon*, 835 F.2d 554, 558-559 (5th Cir. 1987); cf. *SEC* v. *Frank*, 388 F.2d 486, 490-491 (2d Cir. 1968). As in other cases, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Similarly, Rule 52(a)'s requirement that courts make findings of fact and conclusions of law before granting or refusing to grant *interlocutory* injunctions does not imply, as petitioners contend (Pet. 7), that a permanent injunction cannot be granted on summary judgment. Permanent injunctions are not interlocutory and thus do not

Nor was it improper for the district court to base its summary judgment decision granting a permanent injunction "upon collateral estoppel from its prior determination [of liability] in another case, *itself decided on summary judgment.*" Pet. 2-3 (footnote omitted).[7] There is nothing unsual about a case where the facts supporting a finding of liability also support the issuance of injunctive relief; if there is no genuine issue of material fact, summary judgment is appropriate for both dispositions, whether decided in one proceeding or two. See *Moore's Federal Practice*, *supra*, ¶ 56.17[52], at 56-591 to 56-599 (if conditions for collateral estoppel apply, the principle may be invoked in a summary judgment proceeding). Here, petitioners can hardly complain about collateral estoppel: they had a full and fair opportunity in *Lowen* to litigate their ERISA liability, but failed to offer even "a colorable argument that these investments were permissible," 829 F.2d at 1214; the liability issue was actually decided and was necessary to the earlier decision; and the suits by the trustees and the Secretary challenged the same prohibited transactions.[8]

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fall within the rule. In addition, the obligation to issue findings of fact does not entail an obligation to hold a hearing.

[7] Petitioners inaccurately suggest (Pet. 2) that the decision was based "solely" upon the collateral estoppel effect of the earlier *Lowen* decision. The district court stated that it fully considered the additional material that petitioners presented in their papers in this case. Pet. App. 36a-37a, 39a.

[8] Petitioners' due process argument (Pet. 18-22) is tantamount to the nonsensical assertion that a summary judgment proceeding does not comply with the requirements of due process. See *Willner* v. *Committee on Character*, 373 U.S. 96, 107 (1963) (Goldberg, J., concurring) (due process requires

2. Petitioners' additional argument (Pet. 8-13) that the district court erred by granting a permanent injunction based on past violations alone, without consideration of the likelihood of recurrence, also misconstrues the record and the law. ERISA imposes the highest standards derived from the law of trusts on fiduciaries of employee benefit plans. *Donovan* v. *Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir.), cert. denied, 459 U.S. 1069 (1982). These standards "must be enforced with 'uncompromising rigidity.'" *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 330 (1981). Section 502(a)(5) of ERISA, 29 U.S.C. 1132(a)(5), authorizes the Secretary of Labor to seek broad equitable relief, and Section 409(a), 29 U.S.C. 1109(a), specifies that in addition to monetary restitution, a breaching fiduciary "shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." See *Brock* v. *Robbins*, 830 F.2d 640, 647

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notice of evidence and a chance to rebut, but not necessarily the right to confrontation and cross-examination). We do not concede that "the prohibition of future employment in the pension industry and the immense stigma attached to the injunctions in the case at bar" (Pet. 21) necessarily implicate a cognizable property or liberty interest. But assuming they do, petitioners were given ample pre-deprivation "notice and an opportunity to be heard." *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 573 (1972). That opportunity took the form of pleadings, interrogatories, depositions, affidavits, and oral argument before the district court. Had they presented genuine issues as to any material fact bearing on the need for a permanent injunction, petitioners would have been afforded the additional opportunty of an evidentiary hearing. Because they did not, the injunction was granted on summary judgment. For the reasons already stated, that was entirely appropriate. In short, the court afforded petitioners all the process they were due.

(7th Cir. 1987). Congress clearly intended to provide the Secretary with the "full range of * * * equitable remedies," including removal of fiduciaries for "repeated or substantial violations" and injunctions to prevent future violations. H.R. Rep. No. 533, 93d Cong., 1st Sess. 17 (1973); S. Rep. No. 383, 93d Cong., 1st Sess. 106 (1973); see *Marshall* v. *Snyder*, 572 F.2d 894, 901 (2d Cir. 1978). There is, accordingly, ample authority in ERISA for the issuance of permanent injunctions against fiduciaries who have breached their duty of complete and undivided loyalty to the plan beneficiaries.[9]

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[9] Pursuant to Sections 409(a), 502(a)(2), and 502(a)(5), the lower federal courts have granted such permanent injunctions on numerous occasions. See *Brock* v. *Robbins*, 830 F.2d at 648; *Whitfield* v. *Tomasso*, 682 F. Supp. 1287, 1306 (E.D.N.Y. 1988); *Brock* v. *Crapanzano*, No. 84-1899 (S.D. Fla. July 23, 1986), aff'd, 819 F.2d 1148 (11th Cir. 1987) (Table), cert. denied, 484 U.S. 1005 (1988); *Donovan* v. *Bryans*, 566 F. Supp. 1258, 1268 (E.D. Pa. 1983); *Marshall* v. *Mercer*, 4 Employee Benefits Cas. (BNA) 1523, 1536 (N.D. Tex. May 27, 1983), rev'd on other grounds, 747 F.2d 304 (5th Cir. 1984); *Donovan* v. *Williams*, 4 Employee Benefits Cas. (BNA) 1237 (N.D. Ohio Feb. 2, 1983); *Marshall* v. *Carroll*, 2 Employee Benefits Cas. (BNA) 2491 (N.D. Cal. Apr. 18, 1980), aff'd, 673 F.2d 1337 (9th Cir. 1982) (Table); cf. *Freund* v. *Marshall & Isley Bank*, 485 F. Supp. 629, 644 (W.D. Wis. 1979) (removal); *Marshall* v. *Kelly*, 465 F. Supp. 341, 354 (W.D. Okla. 1973) (same). Under the common law of trusts, fiduciaries may be removed to protect the interests of beneficiaries and the assets of the trust if they have (1) committed a serious breach of their duties, see Restatement (Second) of Trusts §§ 107, 199, comment e (1959); (2) committed a breach resulting in serious losses, see G. Bogert & G. Bogert, *Trustss & Trustees* § 527, at 72 (2d rev. ed. 1978); (3) demonstrated that they are unfit to serve trust beneficiaries, see 2 W. Fratcher, *Scott on Trusts* § 107, at 107-108 (4th ed. 1987); or (4) engaged in self-dealing, see G. Bogert,

A permanent injunction was clearly warranted in this case. Petitioners were responsible for more than 100 violations of ERISA during a two and one-half year period. Moreover, their breaches involved blatant self-dealing and imprudent investments costing the Plans tens of millions of dollars. As the appeals court concluded (Pet. App. 46a-47a), "[t]he violations of ERISA * * * were neither technical nor isolated. [Petitioners] had done precisely what the statute expressly forbids and in a massive way." Moreover, petitioners appeared before the court "without remorse [and] with a kitbag of transparent excuses." *Id.* at 45a. There was therefore more than enough justification for the court's holding that "serious misconduct that violates statutory obligations is sufficient grounds for a permanent injunction," and for the court's unwillingness to await "concrete proof of future wrongdoing" or allow "ERISA fiduciaries and their associates * * * to loot a second pension plan before an injunction may be issued." *Id.* at 46a.[10]

Even if a reasonable likelihood of future violations were always a prerequisite to the issuance of a permanent injunction, such likelihood is "frequently established by inferences drawn from past conduct." *United States* v. *Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975). The Second Circuit securities cases that petitioners cite (see Pet.

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supra, § 527 at 75, such as the taking of excessive and unauthorized compensation, *see id.* at 82.

[10] Moreover, the district court considered petitioners' representations that they had no "present intention of offering fiduciary services" in the future and found them to be unconvincing. Pet. App. 37a; see note 4, *supra*. Indeed, the court explicitly stated, "I think there is a likelihood of repetition." Pet. App. 37a.

10-13) are consistent with this principle. Indeed, the court of appeals expressly relied on its precedent that "a permanent injunction may be warranted based on the nature of defendants' violations of the securities laws." Pet. App. 46a, citing *SEC* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972); see also *SEC* v. *Management Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975) ("the commission of past illegal conduct is highly suggestive of the likelihood of future violations"). There are numerous cases approving such injunctions despite the discontinuance of the violations and assurances of future compliance. See, *e.g.*, *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 47-48 (1960); *SEC* v. *Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 100 (2d Cir. 1978); *SEC* v. *Universal Major Indus. Corp.*, 546 F.2d 1044, 1048 (2d Cir. 1976), cert. denied, 434 U.S. 834 (1977).[12]

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[11] Petitioners' reliance (Pet. 8-10) on *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944), and *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953), is inapposite. Those cases simply stand for the proposition that a statutory authorization of permanent injunctive relief must be read in light of traditional equitable practice, and that a court sitting in equity is granted the flexibility to decide whether such a remedy is necessary or appropriate. In upholding the permanent injunction in this case, the court below applied that teaching to the circumstances before it.

[12] In the ERISA context, at least two appellate courts have upheld the propriety of prospective injunctions on facts generally less compelling than those presented here. See *Brock* v. *Robbins*, 830 F.2d at 648 (injunctive relief may be appropriate against imprudent trustees even though there was no loss to the plans and the trustees "may not have been driven by sinister motives"); *Donovan* v. *Cunningham*, 716 F.2d 1455, 1461 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984) (voluntary cessation of alleged violations did not moot the case because the possibility of an injunction barring future

Similarly, petitioners incorrectly argue (see Pet. 13-18) that the lower courts overlooked other equitable considerations that they proffered as mitigating factors, particularly petitioners' alleged reliance on advice of counsel.[13] At the hearing preceding the grant of summary judgment in this proceeding, the district court observed that it had "carefully considered that argument in [their] papers [and] determined that the findings have already been made here and are res adjudicata with respect to the fiduciary violations that took place." Pet. App. 36a.[14] The court of

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service as fiduciaries under other plans remained). See also cases cited in note 9, *supra*.

[13] As noted by petitioner (Pet. 14-15), this argument was presented in the district court principally through the affidavit of counsel to petitioners. On its face, the affidavit was deficient in two respects. It was not based on personal knowledge of the transactions and events giving rise to their liability, as required by Fed. R. Civ. P. 56(e), and, even if accepted as true, it did not explain most of the violations for which petitioners were found liable. Petitioners also presented deposition testimony and a counterstatement alleging material facts in dispute. Their repeated invocation of their Fifth Amendment privilege, however, did not give the court any reason to accept their selective recitation of the facts or to deny the motion for summary judgment in order to take additional evidence on matters that, given the nature of their liability, were at best peripheral to the issue of appropriate relief.

[14] Petitioners additionally complain (Pet. 14-15) that the court gave no consideration to the effect a permanent injunction would have on their professional reputations and legitimate business activities. But the finding of liability in *Lowen* already produced that collateral effect. In any event, in fashioning injunctive relief a court must give priority to protecting the public interest, not the wrongdoers' private interests. See, *e.g.*, *SEC* v. *Culpepper*, 270 F.2d 241, 250 (2d Cir. 1959). Nor is a lifetime bar from ERISA-related activities dispro-

appeals characterized these same arguments as "transparent excuses and frivolous legal contentions." *Id.* at App. 45a. The courts below can hardly be faulted for giving them little or no weight.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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portionate considering that petitioners had participated in ERISA violations "in a massive way." Pet. App. 47a. The comparison to the 13-year statutory bar for persons convicted of enumerated crimes (Pet. 18) is inapt. See 29 U.S.C. 1111. That bar is mandated whether or not the crime was committed in connection with the fiduciary's ERISA duties, and does not preclude a court from issuing an injunction for a longer period in the exercise of its equitable discretion.

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